Internal Revenue Service

memorandum

CC:TL-N-10389-89
TS/LJBYUN

date: DEC 14 1989

to: District Counsel, Chicago MW:CHI
Attn: Victoria S. Crosley and Mayer Silber

from: Senior Technician Reviewer
Tax Shelter Branch CC:TL:TS

subject: [redacted]

This is in response to your memorandum dated September 21, 1989, requesting tax litigation advice with respect to the above referenced taxpayers. You ask for our prompt review since a conference is scheduled with the District Court judge and taxpayers' counsel on December 14, 1989.

ISSUE

Whether, under I.R.C. § 6224(c), a tax assessed as a result of an individual partner's signature on a Form 870-P can be compromised when the taxpayer sues for a refund in the District Court and the settlement offered to the other partners is considerably lower than the amount stated in the Form 870-P.

CONCLUSION

It is our position that a Form 870-P is a binding agreement which can only be rescinded upon a showing of fraud, malfeasance or misrepresentation of fact. In this case, we do not believe the taxpayers can successfully prove fraud, malfeasance or misrepresentation of fact. Accordingly, the executed Form 870-P is binding and the taxpayers should not be offered the more favorable settlement offer.

FACTS

You provide the following facts and chronology of events:

1. Taxpayers Invest in [redacted]

[redacted] Taxpayers invest $[redacted] to acquire an approximate [redacted] percent limited partnership interest in [redacted] -

([redacted]). This partnership is subject to the unified TEFRA partnership procedures.[1]

2. Taxpayers' Form 1040 for [redacted] and [redacted]

[redacted] Taxpayers list [redacted] loss of $[redacted] on their [redacted] Form 1040 and report $[redacted] attributable to the partnership's new property for [redacted] on Form 3468 (Computation of Investment Tax Credit). The resulting ITC wipes out the full income tax liability.

[redacted] Taxpayers list [redacted] loss of $[redacted] on their [redacted] Form 1040 and report $[redacted] attributable to the partnership's new property for [redacted] on Form 3468. The resulting ITC wipes out the full income tax liability.

3. IRS Audits [redacted] for the Years [redacted] and [redacted]

[redacted] The Service begins audit of [redacted] with respect to the taxable year [redacted].

[redacted] The Service begins audit of [redacted] with respect to the taxable year [redacted].

As the audits on these two years progress, the Service appears to be considering a complete denial of all tax losses and credits in connection with [redacted]. The period of limitations for making the assessments have probably been extended by agreement between the partnership's tax matters partner (TMP) and the Service pursuant to section 6229(b).[2]

The 3 year period of limitation on assessment for [redacted] and [redacted] would have expired on [redacted], and [redacted], respectively. The

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[1] We assume [redacted] is subject to the unified TEFRA partnership procedures with respect to both [redacted] and [redacted].

[2] Subsequent to the submission of this tax litigation advice request, we were informed by the Appeals Officer, Gerald Heller, that the periods of limitation with respect to [redacted] and [redacted] were extended by the TMP of [redacted]. Mr. Heller further advised that the two notices of FPAA were timely mailed to the TMP on [redacted]. On the same day, copies of the notices of FPAA were mailed to the notice partners.

periods of limitation have not been raised as an issue by counsel for the taxpayers.

4. Taxpayers File Amended Returns for [redacted] and [redacted]

[redacted] The taxpayers, anticipating the denial of the losses taken on their returns, file amended returns for [redacted] and [redacted].

In both amended returns, all losses and credits related to the partnership are deleted. All references to investment property in the partnership on Form 3468 are also deleted.

On the [redacted] amended return, the taxpayers insert a deduction of $[redacted], the amount expended to acquire their partnership shares. The taxpayers submit payment of $[redacted] to cover the total increase in tax on the [redacted] amended return and $[redacted] to cover the increase on the [redacted] amended return. Each figure includes estimated interest on the increases in tax.

During the next two months, the Service recomputes the interest and sends notice to the taxpayers of the extra interest owed. The taxpayers pay these amounts promptly.

5. Service Sends Form 870-P to Taxpayers

[redacted] The Service sends Form 870-P (Settlement Agreement for Partnership Adjustments) to the taxpayers. A Form 870-P is an agreement with the Service stating that the preliminary results of an audit are accepted by the taxpayer and the deficiency, when assessed, will not be challenged by the taxpayer through the courts or administrative means. The provisions of this agreement are found in section 6224(c).

Specifically, the Form 870-P states that "no claim for refund or credit based on any change in the treatment of partnership items may be filed or prosecuted." Attached to the Form 870-P is a schedule of adjustments which shows that the examination is leading to the denial of all partnership losses for both [redacted] and [redacted] and will produce additional income of $[redacted] in [redacted] and $[redacted] in [redacted].

[redacted] The taxpayers sign the Form 870-P and mail it to the Service.

6. Service Assesses Additional Tax/Interest for [redacted]

[redacted] The Service assesses an increase in tax for [redacted] of $[redacted] and interest of $[redacted]. This assessment was solely a result of the signed Form 870-P.

7. Service Mails Statutory Notice of Deficiency for [redacted]

[redacted] The Service mails a deficiency notice to the taxpayers for [redacted]. The notice only proposes adjustments or additions to tax as follows:

Section 6653(a) - $[redacted]
Section 6659 - $[redacted]
Section 6653(a)(2) - [redacted]% of interest due on deficiency of $[redacted]*

*NOTE: $[redacted] includes the assessment of $[redacted] made on [redacted] as a result of the Form 870-P, and an assessment of $[redacted] made on [redacted] as a result of the amended return for [redacted].

8. Service Assesses Additional Tax/Interest for [redacted]

[redacted] The Service assesses an increase in tax for [redacted] of $[redacted] and interest of $[redacted]. This assessment was solely a result of the signed Form 870-P.

[redacted] The taxpayers pay $[redacted] to satisfy the assessment of [redacted].

9. Service Mails a Statutory Notice of Deficiency for [redacted]

[redacted] The Service sends a deficiency notice to the taxpayers for [redacted]. The notice proposes adjustments or additions to tax as follows:

Section 6653(a)(1) - $[redacted]
Section 5569 - $[redacted]
Section 6653(a)(2) - [redacted]% of interest due on deficiency of $[redacted]
Section 6621(c) - Increased interest

10. Taxpayers File a Petition in Tax Court

[redacted] The taxpayers file a petition in Tax Court to challenge the notice(s) of deficiency.

Paragraph (3) of the petition states:

"The deficiency as determined by the commissioner, all of which is in dispute, is in income tax for the taxable year ended [redacted] in the amount of $[redacted] and [redacted], in the amount of $[redacted], ..." (Emphasis added).

The petitioners make no mention of the penalties listed in the [redacted] deficiency notice. The paragraph ends with a breakdown of the penalties listed on the [redacted] notice alone. The [redacted] notice is not attached to the petition. Finally, the concluding "Wherefore" paragraph in the petition only states that the [redacted] notice is being challenged.

Petitioners claim that their Form 870-P signatures were induced by fraud due to the heading "Settlement Agreement". They claim this title is inappropriate since the Service is actually requesting that the taxpayers completely concede.

11. Taxpayers Make Payment to the Service

[redacted] The taxpayers pay to the Service $[redacted] to satisfy the assessment of [redacted] plus the balance due from previous assessments connected to [redacted].

12. District Counsel Files Answer

[redacted] District Counsel files Answer. Answer denies the fraud allegation and only addresses the [redacted] notice. Answer also states that the "deficiency in dispute is limited to additions to tax" for [redacted].

13. District Counsel Returns Administrative Files for [redacted] to Appeals

[redacted] District Counsel returns administrative files containing [redacted] return to Appeals office with note stating that the deficiency notice issued for that year was "not petitioned". Therefore, assessment of the additions on the [redacted] notice is appropriate.

14. Tax Court Case Assigned to Judge [redacted]

[redacted] The Tax Court Case is assigned for trial to Judge [redacted]. This judge is chosen because she is handling all of the disputes over the taxability of the non-TEFRA [redacted] partnerships. Theoretically speaking, it is possible that the adjustments to the taxpayers' taxes are now non-partnership items and correctly belong with the group of non-TEFRA [redacted] cases.

15. Additions to Tax for [redacted] Assessed

[redacted] The additions to tax listed on the [redacted] deficiency notice are assessed.[3]

16. Appeals Settles with Tax Matters Partner

[redacted] The Appeals office in Long Island, NY which is negotiating the partnership liability with the TMP reaches a settlement with the TMP of the partnership.

At the beginning of negotiations several months earlier, the Service agrees with the TMP that the Service cannot assert that the partnership realized gain for either year. The settlement allows each partner to retain only [redacted]% of the partnership loss claimed on the original returns of the partners.

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[3] Your office has advised that these assessed additions to tax were paid by the taxpayers after this tax litigation advice was requested and that a claim for refund has been filed.

Second, the settlement disallows the full amount of new property reported on the Forms 3468 which nearly negates the ITC claimed in each year's return.

The settlement includes subjecting the partners to penalty assessments under sections 6659 and increased interest under section 6621(c). The Service concedes the penalties imposed by sections 6653(a)(1) and (a)(2) and section 6661.

[redacted] The Long Island Appeals Office mentions in its Appeals Transmittal Memorandum and Supporting Statement that the conclusion of the revenue agent to disallow all expenses claimed by the partnership is legally indefensible since books were actually bought and sold and there is no evidence that a sham transaction took place.[4]

17. Taxpayer Files Refund Suit[5]

[redacted] The taxpayers file a refund suit with the District Court, Central District of Illinois. At issue are:

(1) whether the payments of the assessments made pursuant to the Form 870-P should be refunded; and

(2) whether "the assessment of penalties and additional interest" should be abated.

[redacted] Department of Justice (DOJ) files a no-knowledge answer.

[redacted] DOJ files an amended answer basically defending the suit by asserting that the Form 870-P is binding on the taxpayers and that the

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[4] It is our understanding that under the agreement the taxpayers were required to report positive income. Mr. Heller, the Appeals officer, has advised that this position has since been determined to be legally indefensible. Consequently, the notice of FPAA does not make this assertion.

[5] Your office has advised that claims for refund for both years were timely filed by the taxpayers.

language of Form 870-P is unambiguous and clear.

18. Taxpayers File Motion to Withdraw Petition With Tax Court

[redacted] The taxpayers file a Motion to Withdraw Petition with the Tax Court. The motion states that the petitioners have filed suit in District Court for refund of the assessments and that the continuing Tax Court proceeding would prejudice their refund suit.

19. Settlement Letters Mailed to All Investors

[redacted] Settlement letters are sent out to all the investors affected by the audit in order to receive their approvals of the settlement.

A letter is not sent to the taxpayers in this case because their liability is deemed to have been settled by the Form 870-P signed on [redacted].

20. Taxpayers File Motion for Leave to File Amended Petition with Tax Court

[redacted] Taxpayers file a Motion for Leave to File Amended Petition with the Tax Court. The First Amended Petition deletes all references to the [redacted] liability in order to free it from Tax Court and have it fully eligible for refund litigation.

The grounds for the motion is that a notice of deficiency regarding the [redacted] assessment and interest was never received and that such assessment and interest has already been paid. Note that no notice was sent because the Form 870-P allows the Service to assess without issuing a notice. The notice sent on [redacted] only includes proposed penalties and additional interest.

21. DOJ Files Motion to Dismiss with the District Court

[redacted] DOJ files a Motion to Dismiss with the District Court. The motion is based upon the previous

submission to jurisdiction of the Tax Court over the [redacted] tax deficiency.

[redacted] In a telephone conference among the District Court judge, DOJ and the taxpayers' attorney, it is decided that all litigation should be stayed pending a determination of jurisdiction by the Tax Court over any or all issues regarding either [redacted] or [redacted].

[redacted] The taxpayers' First Amended Petition is served upon Chief Counsel.

[redacted] District Counsel files Answer to First Amended Petition with the Tax Court.

[redacted] In a telephone conference among the District Court judge, a District Counsel attorney, and the taxpayers' attorney, the judge orders the IRS to present its position in this litigation at the next conference set for [redacted], at [redacted].

[redacted] The Service mails to the TMP of [redacted] the notice of FPAA for [redacted] and [redacted].

Copies of the notice of FPAA are mailed to the notice of partners of [redacted].[6]

DISTRICT COUNSEL'S PROPOSED POSITION

You wish to settle this matter by offering to the taxpayers the same settlement offer made to other partners. In your opinion, the traditional elements used in caselaw to uphold settlement agreements are not present in this case. Moreover, you feel it is inequitable to hold the taxpayers to their settlement agreement.

DISCUSSION

I. Form 872-P is a Binding Agreement within the meaning of Section 6224(c)

In your tax litigation advice request, you state that all present caselaw pertaining to the issue of finality of settlement agreements with the Service have dealt with Forms 870 and

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[6] As explained in footnote 2, this information was secured from the Appeals officer, Gerald Heller.

870-AD. Consequently, since the Forms 870-AD and 870-P contain similar provisions, you refer to the caselaw regarding the Form 870-AD for guidance with respect to Form 870-P.

Form 870-AD (Rev. December 1986) provides that, if the taxpayer's offer is accepted by the Commissioner,

> the case shall not be reopened in the absence of fraud, malfeasance, concealment or misrepresentation of material fact, an important mistake in mathematical calculation, deficiencies or overassessments resulting from adjustments made under Subchapters C and D of Chapter 63 concerning the tax treatment of partnership and subchapter S items determined at the partnership and corporate level, or excessive tentative allowances of carrybacks provided by law; and no claim for refund or credit shall be filed or prosecuted for the year(s) stated above other than for amounts attributed to carrybacks provided by law.

Form 870-AD further provides that the offer does not constitute a closing agreement under section 7121.

The Form 870-P executed by the taxpayers provides in pertinent part:

> Under the provisions of section 6224(c) of the Internal Revenue Code, the undersigned offers to enter into a settlement agreement with respect to the determination of partnership items of the partnership for the year(s) shown on the attached schedule of adjustments.
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> * * * *
>
> If this offer is accepted for the Commissioner, the treatment of partnership items under this agreement will not be reopened in the absence of fraud, malfeasance, or misrepresentation of fact; and no claim for refund of credit based on any change in the treatment of partnership items may be filed or prosecuted.

Based on your review of the cases regarding the Form 870-AD, you state that the courts have been divided with respect to when a taxpayer can sue for refund after signing a Form 870-AD. Where the suits for refund have been denied, you state that the denial has been based on the doctrine of equitable

estoppel.[7] In this case, you do not believe all the elements of equitable estoppel are provable.[8]

While we recognize the similarities between the Form 870-AD and Form 870-P, we believe the Form 870-P is more analogous to a closing agreement executed pursuant to section 7121 rather than a Form 870-AD. We so conclude for the reason which you have already pointed out, viz., the statute (section 6224(c))[9] specifically provides that settlement agreements entered into with respect to partnership items shall be binding on all parties to such agreement in the absence of a showing of fraud, malfeasance, or misrepresentation of fact. Moreover, the Form 870-P specifically states that the settlement agreement is pursuant to section 6224(c). Section 7121(a) similarly provides that an agreement entered into pursuant to section 7121 shall be final and conclusive except upon a showing of fraud or malfeasance, or misrepresentation of a material fact.[10] The Form

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[7] For example, you cite to Kretchmar v. United States, 9 Cl.Ct. 191 (1985).

[8] We note that the Service has adopted the position that Form 870-AD settlements should be defended solely on the basis of equitable estoppel and not on the ground that the Form 870-AD is a bilateral contract. Uinta Livestock Corp. v. United States, AOD-OM 16949 (July 1, 1970).

[9] Section 6224(c)(1) provides that in the absence of a showing of fraud, malfeasance, or misrepresentation of fact, a settlement agreement between the Secretary and 1 or more partners in a partnership with respect to the determination of partnership items for any partnership taxable year shall (except as otherwise provided in such agreement) be binding on all parties to such agreement with respect to the determination of partnership items for such partnership taxable year.

[10] Section 7121 provides that (a) the Secretary is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts), in respect of any internal revenue tax for any taxable period and (b) if such agreement is approved by the Secretary (within such time as may be stated in such agreement, or later agreed to) such agreement shall be final and conclusive, and except upon a showing of fraud or malfeasance, or misrepresentation of a material fact (1) the case shall not be reopened as to the matters agreed upon or the agreement modified by any officer, employee, or agent of the United States, and (2) in any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded.

870-AD, on the other hand, is not authorized by any statute and, in fact, expressly provides that the offer does not constitute a closing agreement under section 7121. Rather, authority for such forms have been considered to be inherent in the Service's authority to administer the internal revenue laws.

Like the closing agreement under section 7121, the finality of which is statutorily defined,[11] section 6224(c) defines the limited circumstances under which the agreement executed pursuant to section 6224(c) will not be binding. Under section 6224(c), the agreement is binding unless there is a showing of fraud, malfeasance, or misrepresentation of fact. Therefore, it is our position that the terms of the Form 870-P is binding on the taxpayers unless they can show fraud, malfeasance, or misrepresentation.

In this case, we do not believe the taxpayers can successfully prove fraud, malfeasance, or misrepresentation of

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[11] See, e.g., Estate of Johnson v. Commissioner, 88 T.C. 225, 231 (1987) ("A closing agreement, once approved by the Secretary, is a final and conclusive agreement between the parties as to all matters contained therein. The agreement may not be annulled, modified, set aside, or disregarded, except 'upon a showing of fraud, malfeasance or misrepresentation of a material fact.' Sec. 7121(b)(2); see Cramp Shipbuilding Co. v. Commissioner, 14 T.C. 33, 37 (1950), affd. per curiam sub nom. Commissioner v. Harriman Ripley & Co., 202 F.2d 280 (3d Cir. 1953)."); Bank of Commerce & Trust Company v. United States, 124 F.2d 187 (6th Cir. 1941) (The judgment of the District Court affirmed since it appeared that "no fraud, malfeasance, or misrepresentation of a material fact is shown with reference to the closing agreement executed by the parties . . . and such closing agreement being therefore final and conclusive."); Hering v. Tait, 65 F.2d 703, 705 (4th Cir. 1933) ("It will be noted that closing agreements entered into pursuant to this statute are made final and conclusive and that they may not be annulled, modified, set aside, or disregarded, except upon a showing of fraud, malfeasance, or misrepresentation."); Wolverine Petroleum Corporation v. Commissioner, 75 F.2d 593, 595 (8th Cir. 1935) ("The purpose of the statute authorizing closing agreements is to enable the taxpayer and the government finally and completely to settle all controversies in respect of the tax liability for any previous taxable period, and to protect the taxpayer against the reopening of the matter at a later date, and to prevent the filing of additional claims for refund or the institution of suit for the same purpose by the taxpayer. . . . The statute excludes mistakes of fact as well as of law as grounds for the rescission of closing agreements. Only fraud, malfeasance, or misrepresentation are mentioned as bases for attacking them.")

fact. Accordingly, we should take the position that the executed Form 870-P is binding on these taxpayers.

We do note, however, that in the context of a closing agreement, Chief Counsel previously advised the Commissioner that section 7121 may not necessarily preclude mutual modification of a closing agreement. Closing Agreements - Mutual Rescission, GCM 36422, I-143-75 (Sept. 16, 1975) (copy attached). The General Counsel Memorandum stated:

> Upon reconsideration, we do not believe that we can advise that the statute precludes you from entering into a mutual agreement of rescission or modification of a closing agreement. Rather, it is a question of policy to be decided at your discretion. If you wish to continue to adhere to the position that the statute prohibits a mutual agreement to change a closing agreement, there is ample basis for you to do so.

The memorandum pointed out that section 711(1) of the Closing Agreement Handbook takes the position that the closing agreement is unequivocally final. Therefore, it was recommended that section 711(1) be revised should the Commissioner decide to adopt the new position. Section 711(1), as revised on May 27, 1983, continues to provide that the closing agreement is final and that "[i]n view of the statutory language, the parties to a closing agreement cannot rescind or modify it by consent." Section 730 of the Handbook reiterates this position by providing that while a closing agreement may not be modified or rescinded by the parties (whether unilaterally or by mutual consent), it may be clarified. Therefore, it appears that with respect to closing agreements, the position still stands that mutual modifications are not to be effected. In any event, Counsel would not have the authority to modify or rescind a closing agreement.

II. Form 870-P Converts Partnership Items to Nonpartnership Items

Because we conclude that the Form 870-P is binding against the taxpayers, the partnership items of [redacted] with respect to the taxable years [redacted] and [redacted] converted to nonpartnership items on [redacted], the date the Form 870-P was accepted for the Commissioner.

Under section 6231(b)(1)(C)[12], if a partner settles out, the partnership items of the partner become nonpartnership items as of the date the settlement agreement is signed for the Commissioner. Section 6229(f), in turn, provides that if the partnership items become nonpartnership items under section 6231(b), the Service shall have 1 year from the date the items become nonpartnership items (i.e., the date the settlement agreement is signed for the Commissioner) to assess any tax attributable to such items (or any item affected by such items).[13]

Section 6230(a)(2)(A)(ii) provides that the deficiency procedures do not apply in assessing a tax pursuant to a settlement agreement[14] but that it does apply in assessing a deficiency attributable to affected items which require partner level determinations. Section 6230(a) provides in part:

> (1) IN GENERAL. -- Except as provided in paragraph (2), subchapter B of this chapter shall not apply to the assessment or collection of any computational adjustment.
>
> (2) DEFICIENCY PROCEEDINGS TO APPLY IN CERTAIN CASES. --
>
> (A) Subchapter B shall apply to any deficiency attributable to --

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[12] Section 6231(b)(1)(C) provides that the partnership items of a partner for a partnership taxable year shall become nonpartnership items as of the date the Secretary enters into a settlement agreement with the partner with respect to such items.

[13] Section 6229(f) provides that if, before the expiration of the period otherwise provided in this section for assessing any tax imposed by subtitle A with respect to the partnership items of a partner for the partnership taxable year, such items become nonpartnership items by reason of 1 or more of the events described in section 6231(b), the period for assessing any tax which is attributable to such items (or any item affected by such items) shall not expire before the date which is 1 year after the date on which the items become nonpartnership items. This period may be extended by agreement between the Secretary and the partner.

[14] Rather, a computational adjustment is made and the agreed to tax is automatically assessed without resort to the deficiency procedures. Section 6231(a)(6) defines the term "computational adjustment" to mean the change in the tax liability of a partner which properly reflects the treatment under this subchapter of a partnership item.

(i) affected items which require partner level determinations, or
(ii) items which have become nonpartnership items (other than by reason of section 6231(b)(1)(C)) and are described in section 6231(e)(1)(B). (Emphasis added.)

In this case, the Form 870-P was countersigned for the Commissioner on [redacted]. Hence, the partnership items with respect to [redacted] for the taxable years [redacted] and [redacted] converted to nonpartnership items on [redacted]. Accordingly, the Service had until [redacted], to (1) make the computational adjustment in accordance with the settlement agreement and to assess such tax (and interest) and (2) to issue affected items statutory notice of deficiency for both [redacted] and [redacted]. The facts indicate that the assessments were timely made with respect to [redacted] and [redacted] on [redacted], and [redacted], respectively. The Service also timely issued the affected items statutory notice of deficiency with respect to [redacted] and [redacted] on [redacted], and [redacted], respectively.[15]

III. Tax Court Lacks Jurisdiction With Respect to the Former Partnership Items

As discussed above, the deficiency notices that were mailed to the taxpayers with respect to [redacted] and [redacted] are affected items deficiency notices. As such, the Tax Court lacks jurisdiction to redetermine the partnership items of [redacted] pursuant to either of the deficiency notices that were issued to the taxpayers. At best, the Tax Court only has jurisdiction to redetermine the additions to tax for [redacted].[16]

The only circumstance under which the Tax Court would have had proper jurisdiction over the partnership items was if the taxpayers had not settled and a notice of FPAA had been issued and a petition was filed either by the TMP or a partner other

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[15] Additions to tax under sections 6653, 6659, 6661 and 6621(c) are affected items which require a partner level determination. Maxwell v. Commissioner, 87 T.C. 783 (1986); N.C.F. Energy Partners v. Commissioner, 89 T.C. 741 (1987). Therefore, the deficiency notices with respect to these items were properly issued.

[16] The facts under Number 10 indicate that the taxpayers' intent was to put into issue the adjustments to income tax for [redacted] and [redacted] and the additions to tax for [redacted]. The additions to tax for [redacted] were not raised in the petition.

than the TMP in accordance with the provisions of sections 6226(a) and (b).[17]

Section 6226(a) provides that within 90 days after the day on which a notice of FPAA is mailed to the TMP, the TMP may file a petition for a readjustment of the partnership items for such taxable year with (1) the Tax Court, (2) the District Court, or (3) the Claims Court. If the TMP does not file a petition within the 90-day period provided by section 6226(a), any notice partner (and any 5-percent group) may, within 60 days after the close of the 90-day period within which a TMP may file a petition, file a petition in any of the three courts. I.R.C. § 6226(b).

Tax Court Rule 240(c) follows the provisions of the Code by providing:

> (c) The Court does not have jurisdiction of a partnership action under this Title (Title XXIV - Partnership Actions) unless the following conditions are satisfied:
>
> > (1) Actions for Readjustment of Partnership Items: (i) The Commissioner has issued a notice of final partnership administrative adjustment. See Code Section 6226(a) and (b).
> >
> > (ii) A petition for readjustment of partnership items is filed with the Court by the tax matters partner within the period specified in Code Section 6226(a), or by a partner other than the tax matters partner subject to the conditions and within the period specified in Code Section 6226(b).[18]

The notice of FPAA was not mailed to the TMP until [redacted]. This date is subsequent to the date that the petition was filed with the Tax Court (i.e., [redacted]). As section 6226 unequivocally points out, the Tax Court's (as well as the District Court's and Claims Court's) jurisdiction is invoked with respect to the partnership items only pursuant to a notice of FPAA (and not also an affected items deficiency notice). Accordingly, the Tax Court does not have jurisdiction over the

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[17] We do note, however, that if the partnership items had converted for reasons other than due to the execution of a settlement agreement, the deficiency procedures would have applied. I.R.C. § 6230(a)(2)(A)(ii).

[18] See, also, Maxwell v. Commissioner, 87 T.C. 783, 788 (1986).

partnership items of [redacted] for [redacted] or [redacted]. The Court only has jurisdiction over the additions to tax for [redacted].

In addition, the Tax Court lacks jurisdiction since there is no "deficiency" attributable to the converted partnership items to redetermine. Section 6214 provides that the Tax Court shall have jurisdiction to redetermine the correct amount of the deficiency and to determine whether any additional amount, or any addition to the tax should be assessed. Under the facts of this case, there is no "deficiency" attributable to the converted partnership items to redetermine since such taxes for [redacted] and [redacted] have already been assessed and paid by the taxpayers.[19]

Therefore, a motion to dismiss for lack of jurisdiction and to strike would have to be filed.[20] The motion to dismiss and to strike would include not only the partnership items but also the increased interest under section 6621(c). In this regard we refer you to LGM, TL-21, In re: Assertion of the I.R.C. § 6621(c), Formerly Section 6621(d), Increased Rate of Interest, dated January 22, 1988. Based on this LGM, we also conclude that the Tax Court would not have jurisdiction over section 6621(c) where the deficiency notice only raises additions to tax and not also the underlying deficiency itself.

III. District Court's Jurisdiction

As discussed above, the Tax Court lacks jurisdiction over the substantive adjustments with respect to the years [redacted] and [redacted] and the additions to tax for [redacted] but does properly have jurisdiction over the additions to tax for [redacted].

With respect to the District Court action, a taxpayer may file a refund suit to recover (1) any tax alleged to have been erroneously or illegally assessed or collected, (2) any penalty claimed to have been collected without authority or (3) any sum alleged to have been excessive or in any manner wrongfully collected, if a claim for refund or credit has been duly filed

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[19] Under section 6211, the term "deficiency" is defined to mean the amount by which the tax imposed by subtitle A or B, or chapter 41, 42, 43, or 44, exceeds the excess of -- (1) the sum of (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over (2) the amount of rebates, as defined in subsection (b)(2), made.

[20] We assume the Court did not grant petitioners' motion to withdraw the petition since the facts indicate that the petitioners subsequently filed a Motion for Leave to File Amended Petition - to delete all references to [redacted].

with the Service. I.R.C. § 7422(a). Section 6532 further provides that no refund suit under 7422 shall be begun before the expiration of 6 months from the date the claim for refund is filed unless the Secretary renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.

In this case, we have been advised that the taxpayers did timely file claims for refund with respect to the [redacted] and [redacted] deficiencies. Therefore, the District Court does have jurisdiction with respect to the underlying deficiencies. However, before reaching the substantive issues concerning the refund, the District Court must first determine whether there was any fraud, malfeasance or misrepresentation of fact relating to the settlement agreement.

The District Court would not have jurisdiction over the additions to tax for [redacted] since the Tax Court has jurisdiction over these items. See section 7422(e). With respect to the additions to tax for [redacted], however, the taxpayers would be able to bring a refund suit in the District Court once the claim for refund is disallowed by the Service. We note that it would now be too late to bring an action in the Tax Court since the 90-day period under section 6213 has passed and the taxpayers did not put the additions to tax for [redacted] in issue in the Tax Court petition.

If you should have any questions, please call Lisa Byun at FTS 566-3289.

CURTIS G. WILSON

Attachment:
As stated.